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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 00 022 51252 Office: CALIFORNIA SERVICE CENTER Date: NOV 04 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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**DISCUSSION:** The Director, California Service Center, denied the employment-based visa petition. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal and a motion to reopen and reconsider. The matter is now before the AAO on a second motion to reopen and reconsider. The motion will be dismissed.

The petitioner is an organization incorporated in the State of California in October 1991. It imports and sells furniture and accessories. It seeks to employ the beneficiary as its marketing manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity. On November 13, 2002, the AAO affirmed the director's decision. The AAO dismissed a subsequently filed motion to reopen and reconsider on the grounds that the petitioner had not submitted new evidence and had not submitted reasons for reconsideration or pertinent precedent decisions showing the AAO's decision was based on an incorrect application of law or policy.

On motion received November 3, 2003, counsel for the petitioner submits a letter requesting reconsideration of the AAO's decision to dismiss the petitioner's motion to reopen and reconsider. Counsel asserts that the petitioner pointed out in the first motion to reopen and reconsider that the AAO did not pay enough attention to the facts and statements the petitioner provided. Counsel contends that the petitioner's different interpretation of the beneficiary's job description should have been a sufficient foundation to reopen and reconsider the facts presented. Counsel also claims that the petitioner's job descriptions for the positions subordinate to the beneficiary provided on motion should have been considered new evidence. Finally, counsel concludes that the beneficiary was qualified for a managerial position when the petition was filed. Counsel includes the petitioner's previous interpretation of the elements contained in the definition of managerial and executive capacity and previous approvals of the beneficiary's classification as an L-1A intracompany transferee to support his conclusion.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Neither counsel nor the petitioner has submitted pertinent precedent decisions to establish that the AAO's previous decision was based on an incorrect application of law or Citizenship and Immigration Service (CIS) policy. For the sake of clarity, the AAO makes the following observations.

The AAO has twice before reviewed the petitioner's job description and the petitioner's interpretation of how the beneficiary's job duties comport with the definitions of managerial and executive capacity. The AAO will not review this description and interpretation for a third time. Suffice it to say that any further review would only further undermine the petitioner's contention that the beneficiary actually supervised or managed the warehouse department. The AAO notes that the initial job description, as refined in the petitioner's response to the director's request for evidence, does not include detail regarding the beneficiary's duties relating to the warehouse department. The beneficiary's job description is limited to activities associated with marketing, selling the petitioner's product, and supervising sales associates. The AAO detailed the reasons for concluding that the beneficiary's job description did not comport with the statutory definitions of managerial and executive capacity in its dismissal of the initial appeal. The petitioner's different opinion on this matter is not a sufficient basis to reconsider the previous decisions.

The AAO further observes that the petitioner's first motion to reopen and reconsider did not contain new facts. Counsel claims that the petitioner presented more specific information regarding the duties of the beneficiary's subordinates in the first motion to reopen. However, the petitioner had an opportunity on appeal to present evidence that would demonstrate that the beneficiary did not perform the daily operational duties of the petitioner. The petitioner did not submit evidence showing that individuals other than the beneficiary performed the marketing duties or the first-line supervisory duties of the sales department. The petitioner's submission of detailed descriptions of the beneficiary's subordinates duties for the first time on motion cannot be considered "new facts." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding. Counsel's assertion that the beneficiary's promotion to vice-president subsequent to filing the petition is new relevant evidence is not persuasive. The AAO acknowledges that the petitioner would not promote an unqualified individual to the position of vice-president. However, the beneficiary's past success at promoting the company and supervising sales associates is not sufficient to demonstrate that the beneficiary's "marketing manager" position was managerial or executive.

Counsel's reference to the beneficiary's previous classification as an L-1A intracompany transferee is not relevant to this proceeding. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L1-A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on

behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, it should be noted for the record that, unless CIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. *See* 8 C.F.R. § 103.5(a)(1)(iv).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. The regulation at 8 C.F.R. § 103.5(a)(4) states: "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER**: The motion is dismissed.